IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8128 of 2001

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MARRY JOSE

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 8128 of 2001
MR PH PATHAK for Petitioner No. 1
MR MUKESH A PATEL for Respondent No. 1
NOTICE SERVED BY DS for Respondents No. 1,2
MR KK SHAH for Respondent No. 3
SUNITA S CHATURVEDI for Respondent No. 3

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE D.A.MEHTA

Date of decision:11/02/2002

CAV.JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1 The petitioner, an employee in the Medical Services of Western Railways, has challenged the order of Central Administrative Tribunal dated 04/09/2001 passed in O.A.No.357 of 1999 with M.A.No.512 of 2001 and M.A.No./522 of 2001 under Article 227 of the Constitution of India. With consent of the contesting parties we are disposing of this Special Civil Application finally. Draft amendment dated 24/09/2001 is granted and the petitioner shall carryout necessary amendment immediately.

2. Rule. Mr. Mukesh A.Patel, appearing on behalf of respondent nos. 1 and 2 waives service of Rule and Mr.K.K.Shah, appearing on behalf of private respondent No.3 waives service of Rule.

3. The petitioner joined services of Railway as Staff Nurse on 1/2/1966 in Jaipur division. A request transfer was granted to her and she was posted in Vadodara division in 1973. The post of Staff Nurse carried the scale of Rs.1400-2600. The petitioner was thereafter promoted to the post of Nursing Sister with effect from 1/1/1984 which was in the grade of Rs.1640-2900. The petitioner was further promoted with effect from 15/5/1990 to the post of Matron in the grade of Rs.2000-3200.

4. It appears from the records that private respondent No.3, one Smt.S.K.Gamit was appointed as Staff Nurse on 25/3/1976. She was promoted as Nursing Sister on 1/8/1979 and as Matron on 1/1/1984.

5. The Western Railway Headquarters prepared a base grade seniority list and circulated the same by letter dated 25/9/1996 issued by Divisional Railway Manager, Western Railway, Vadodara, whereunder the petitioner was placed at sr.no.17 and respondent no.3 was shown at sr.no.67. However, the Vadodara division on 30/4/1998 issued a seniority list whereunder respondent no.3 was shown at sr.no.2 and the petitioner was shown at sr.no.5 and consequential promotion to respondent No.3, which has given rise to this litigation. The petitioner challenged the said seniority list before the Central Administrative Tribunal, Ahmedabad by filing application on 7/6/1999, interalia contending that respondent no.3 being a Scheduled Tribe candidate got jumping promotion in all cadres till the post of Matron, but as the petitioner had

reached the grade of Matron on 15/5/1990, the petitioner must be permitted to regain her seniority and further promotion should be made strictly on the basis of base grade seniority.

6. During the pendency of the Original Application the petitioner claimed interim relief restraining the respondent administration from granting promotion to respondent no.3 to the post of Chief Matron. The Tribunal however, passed the following order in relation to interim relief on 7/6/1999 :

"O.A.No.357/99 Date of order 7.6.1999

Heard Mr.Khurana. Issue notice returnable on 8.7.1999. As regards interim relief sought for, it would seem that the applicant proceeds on the apprehension that one Smt.S.K.Gamit who is at sr.no.67 of Annexure -a/1 is likely to be promoted ignoring the seniority list even though according to Mr.Khurana there is no reserved post available for Schedule Tribe. There is nothing to show that the respondents will not act in accordance with the law and rules while effecting promotion as the interim direction sought for is not granted.

Sd/- AS Sanghavi, Sd/-V.Ramakrishnan
Member-J Vice Chairman "

7. Inspite of the aforesaid observation of the Tribunal while declining the interim relief, the petitioner found herself at the receiving end as the Railway administration by order dated 28/6/1999 promoted respondent No.3 to the post of Chief Matron ignoring the base grade seniority. The Tribunal, however, after final hearing rejected the application of the petitioner by stating that the petitioner had not challenged the earlier seniority list and the seniority list notified by the headquarters on the basis of the date of appointment could not help the case of the petitioner. The Tribunal in its final para also observed as under :

"Merely because the applicant was appointed in the year 1966, she cannot get the seniority over the respondent no.3 in the cadre of Matron or the Chief Matron as she was not appointed in the cadre of the Matron but was required to get promoted as a staff nurse and nursing sister etc. It is also not shown by the applicant that the

respondent no.3 had got jumping promotion on the basis of belonging to the reserved category at any time".

8 Mr.P.H.Pathak, learned Advocate appearing on behalf of the petitioner contended that the Tribunal had erred in rejecting the application of the petitioner without appreciating the correct position of facts as well as the law declared by the Supreme Court. Referring to and relying upon the various circulars issued by the Railway Board it was contended that though the administration had correctly understood the exposition of law made by the Apex Court, yet the Vadodara Division of Railways had ignored the said position and favoured the respondent No.3 while granting promotion to the post of Chief Matron and the Tribunal had also fallen into the same error viz. ignoring law as laid down by the Supreme Court.

9 Mr.Mukesh A.Patel, appearing on behalf of the Railway Administration supported the order of the Tribunal by stating that the petitioner had not challenged any of the earlier seniority lists and had approached the Tribunal at a belated stage and should not be permitted to make a grievance at this stage. That it should be held that the petitioner could not rely upon the seniority list issued by the Headquarters as the same pertained to all the divisions falling within the zone and the respondents had rightly relied upon the divisional seniority and no favour was shown to respondent No.3.

10. Mr.K.K.Shah, appearing on behalf of the respondent No.3 submitted that seniority and promotion were governed by Railway Manual. That the petitioner had all along accepted the earlier promotions and seniority lists whereunder respondent No.3 had been shown ahead of the petitioner. That taking into consideration the fact that no other employee falling within the general class had challenged either seniority or promotion, the Tribunal's order should be upheld. It was further submitted that in this context the ground regarding petitioner's claim being barred by limitation had been raised before the Tribunal but the same had not been decided and the petitioner had further failed to show that respondent No.3 had been promoted out of turn on the basis of reservation roster. In support of his submissions Mr.Shah relied upon the following decisions:

[1] R.K.Sabharwal and Others vs. State of Punjab and others - (1995) 2 SCC 745.

[2] Akhil Bharatiya Soshit Karmachari Sangh vs. Union of India - (1996) 6 SCC 65.

[3] L.Chandra Kumar vs. Union of India and others - (1997) 3 SCC 261.

11. Mr.Shah also relied upon The Constitution (Eighty-Fifth Amendment) Act,2001, whereby Article 16(4A) of the Constitution of India is amended in the following manner :

Before Amendment Article 16(4A) :

"16. Equality of opportunity in matters of public employment.-

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[(4-A). Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State]".

After Amendment Article 16(4A) :

"[(4-A). Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State]" (emphasis supplied)

12. It was submitted that the same has received Presidential assent on 4/1/2002 and has become effective from 17/6/1995 i.e. the operation of the amended provision is retrospective from the said date. Thus, according to him nothing survived in the petition and the same was required to be dismissed. This preliminary contention requires to be stated to be rejected. As is evident, the provision is an enabling one. The State is empowered to provide for reservation, as regards promotion of specified categories of persons, overriding other provisions of Article 16. This is the position

before amendment. After amendment the said power is extended in relation to consequential seniority. However, the respondents, especially respondent No.1, have singularly failed to show that any such reservation was made providing for promotion with consequential seniority. Hence, this enabling power having not been shown to have been exercised respondent No.3 cannot claim any benefit under the said provision. It is significant that respondent No.1, who can exercise the power has not even raised a contention in this regard.

13. The controversy with which we are required to deal with is no longer res integra. In fact, by now there are atleast six or more decisions of the Apex Court which have laid down various principles governing the question of inter se seniority between general candidates vis-a-vis reserved candidates. Inspite of this situation it is the applicability of various decisions which have created problems from time to time. However, the position now seems to have been settled and this is what has been laid down by the Apex Court.

14. On 10/10/1995 in the case of Union of India and others vs. Veerpalsinh Chauhan (1995) 6 SCC 684,it is stated thus :

"(iii) So far as Railway Guards in Railway service are concerned - that is the only category we are concerned herewith - the seniority position in the promoted category as between reserved candidates and general candidates shall be the same as their inter se seniority position in Grade 'C' at any given point of time provided that at that given point of time, both the general candidates and the reserved category candidates are in the same grade. This rule operates whether the general candidate is included in the same batch of promotees or in a subsequent batch.(This is for the reason that the circulars/letters aforesaid do not make or recognise any such distinction). In other words, even if a Scheduled Caste/Scheduled Tribe candidate is promoted earlier by virtue of rule of reservation/roster than his senior general candidate and the senior general candidate is promoted later to the said higher grade, the general candidate regains his seniority over such earlier promoted Scheduled Caste/Scheduled Tribe candidate. The earlier promotion of the Scheduled Caste/Scheduled Tribe candidate in such

a situation does not confer upon him seniority over the general candidate even though the general candidate is promoted later to that category."

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"45. It is true that this case presents a rather poignant turn of events. Of the thirty-three candidates being considered for eleven vacancies, all are Scheduled Caste/Scheduled Tribe candidates. Not a single candidate among them belongs to general category. The learned counsel for the respondent is justified in complaining that the appellants have failed to explain how such a situation has come about. Not only the juniors are stealing a march over their seniors but the march is so rapid that not only erstwhile compatriots are left far behind but even the persons who were in the higher categories at the time of entry of Scheduled Caste/Scheduled Tribe candidates in the service have also been left behind. Such a configuration could not certainly have been intended by the Framers of the Constitution or the framers of the rules of reservation. In the absence of any explanation from the authorities, the best we can do is to ascribe it as faulty implementation of the rule of reservation. In other words, not only have the Railways not observed the principle that the reservation must be vis-a-vis post and not vis-a-vis vacancies but they had also not kept in mind the rule of seniority in the promotion posts enunciated in the Railway Board's circulars referred to (supra). Yet another principle which the authorities appeared to have not observed in practice is that once the percentage reserved for a particular reserved category is satisfied in that service category or grade (unit of appointment) the rule of reservation and the roster should no longer be followed. Because of the breach of these three rules, it appears, the unusual situation complained of by the general candidates has come to pass. The learned Counsel for general candidates is right that such a situation is bound to lead to acute heartburning among the general candidates which is not conducive to the efficiency of administration. Be that as it may, the question is can the said situation be rectified. Probably not, until we direct all the promotions to be reviewed and

redone. This may not be advisable at this distance of time. The enormity of the exercise should deter anyone from launching upon such a course. It is evidently for this reason that the Constitution Bench has directed in R.K.Sabharwal that the rule affirmed by them should be applied only prospectively. There is yet another circumstance : the Scheduled Caste/Scheduled Tribe candidates cannot be barred from competing for general posts. We are constrained to remark that it is the application of rule of reservation in the matter of promotions - which entitles a reserved category candidate to avail of the benefit of reservation any number of times which is mainly responsible for such situation".

15. This decision was followed and reiterated on 1/3/1996 in the case of Ajitsingh Juneja and others vs. State of Punjab and others (1996) 2 SCC 715. In the said decision it was contended on behalf of the respondent that the view expressed in the case of Veerpalsinh (supra) was on the basis of the circular which was under consideration and should not be applied to all services. The Apex Court specifically held that the question had to be tested on the basis of constitutional scheme of Articles 14 and 16 of the Constitution. Thus, the ratio of Veerpalsinh's case came to be upheld on the basis of applicability of Articles 14 and 16 of the Constitution of India.

16. It appears that another Bench of the Supreme Court took a different view of the matter in the case of Jagdish Lal vs. State of Haryana, (1997) 6 SCC 538, thus requiring constitution of Larger Bench (5 Judges) in the Supreme Court. This case came to be known as Ajitsingh and others (II). The decision is reported in (1999) 7 SCC 209 and was decided on 16/9/1999. The Apex Court formulated the following four points for its decision and decided the same in the following terms :

"Points.

(1) Can the roster-point promotees (reserved category) count their seniority in the promoted category from the date of their continuous officiation vis-a-vis general candidates who were senior to them in the lower category and who were later promoted to the same level ?

(2) Have Virpal and Ajit Singh been correctly decided and has Jagdish Lal been

correctly decided ?

(3) Whether the 'catch-up' principles contended for by the general candidates are tenable ?

(4) What is the meaning of the 'prospective` operation of Sabharwal and to what extent can Ajit Singh be prospective ?"

" Our conclusions on Points (1) and (2).

77. We, therefore, hold that the roster-point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, - vis-a-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate - he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level. We shall explain this further under Point 3. We also hold that Virpal and Ajit Singh have been correctly decided and that Jagdish Lal is not correctly decided. Points 1 and 2 are decided accordingly".

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"81. As accepted in Virpal (see SCC at p.702) and Ajit Singh (see SCC at P.729), we hold that in case any senior general candidate at Level 2 (Assistant) reaches Level 3 (Superintendent Grade II) before the reserved candidate (roster-point promotee) at Level 3 goes further upto Level 4 in that case the seniority at Level 3 has to be modified by placing such a general candidate above the roster promotee, reflecting their inter se seniority at Level 2. Further promotion to Level 4 must be on the basis of such a modified seniority at Level 3, namely, that the senior general candidate of Level 2 will remain senior also at Level 3 to the reserved candidate, even if the latter had reached Level 3 earlier and remained there when the senior general candidate reached that Level 3. In cases where the reserved candidate, has gone up to Level 4

ignoring the seniority of the senior general candidate at Level 3, seniority at Level 4 has to be refixed (when the senior general candidate is promoted to Level 4) on the basis of when the time of reserved candidate for promotion to Level 4 would have come, if the case of the senior general candidates was considered at Level 3 in due time. To the above extent, we accept the first part of the contention of the learned counsel for the general candidates. Such a procedure in our view will properly balance the rights of the reserved candidates and the fundamental rights guaranteed under Article 16(1) to the general candidates."

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"89. It is axiomatic in service jurisprudence that any promotions made wrongly in excess of any quota are to be treated as ad hoc. This applies to reservation quota as much as it applies to direct recruits and promotee cases. If a court decides that in order only to remove hardship such roster-point promotees are not to face reversions, - then it would , in our opinion be, necessary to hold - consistent with our interpretation of Articles 14 and 16(1) - that such promotees cannot plead for grant of any additional benefit of seniority flowing from a wrong application of the roster. In our view, while courts can relieve immediate hardship arising out of a past illegality, courts cannot grant additional benefits like seniority which have no element of immediate hardship. Thus, while promotions in excess of roster made before 10-2-1995 are protected, such promotees cannot claim seniority. Seniority in the promotional cadre of such excess roster-point promotees shall have to be reviewed after 10-2-1995 and will count only from the date on which they would have otherwise got normal promotion in any future vacancy arising in a post previously occupied by a reserved candidate. That disposes of the 'prospectivity` point in relation to Sabharwal."

17. To summarise : The position in law is that once the general candidate reaches the level where the reserved candidate had preceded him inter se seniority at that level will have to be refixed and further promotion will have to be governed on the basis of such refixed seniority. In other words, if the general candidate

catches up the roster point promotee in a particular level, eventhough the reserved candidate had reached such a level before the general candidate, the general candidate would regain the seniority of the base grade and further promotions shall be governed on the basis of such regained seniority. Promotions granted to the reserved candidates before 10/2/1995 (Sabharwal's case) or 1/3/1996 (Ajitsingh's case) would be protected, however, such promotees cannot claim seniority in the promotional cadre in relation to any future vacancy.

18. Applying the aforesaid ratio to the facts of the case, it is apparent that the petitioner had joined the base cadre as Staff Nurse before respondent No.3 i.e. on1/2/1966 while respondent No.3 was appointed on 25/3/1976. During the course of argument it was contended on behalf of the Railway Administration that the petitioner had voluntarily sought transfer from Jaipur Division to Vadodara Division in 1973 and hence even if seniority had to be counted in Vadodara Division it would be only from 1973. Even taking this contention as being applicable, yet the petitioner is ahead of respondent No.3 in the base cadre seniority in as much as respondent No.3 has joined service only in March,1976. The petitioner reached the scale of Matron on 15/5/1990 wherein respondent No.3 was already there since 1/1/1984. Thus, both the petitioner and respondent No.3 came to -gether in the said cadre viz. of Matron and by virtue of operation of 'catch up` principle the petitioner regained her seniority which she was enjoying in the base cadre i.e. at the point of entry. The point of time viz. June,1999 when the question of promotion to the post of Chief Matron arose as the petitioner had regained her seniority, it was she who was entitled to be promoted ahead of respondent No.3. The Tribunal thus clearly fell into error in not only rejecting the claim of the petitioner but not granting interim relief at the stage when it was sought. If the petitioner had been granted interim relief during the pendency of the application before the Tribunal, possibly this litigation could have been avoided.

19. The Tribunal further fell into error when it observed that the petitioner had not shown that respondent No.3 had got jumping promotion on the basis of belonging to the reserved category. As can be seen from the application made before the Tribunal in para 3 the petitioner had specifically averred that respondent No.3 had gained promotion on the basis of reserved quota of Scheduled Tribe. In fact, this position has not been disputed as can be seen from the affidavit-in-reply filed

on behalf of the Railway Administration. The petitioner had also reiterated the position as is evident from the written submissions filed before the Tribunal on behalf of the petitioner. Infact, one of the grievances made during course of hearing, on behalf of the petitioner, was to the effect that the Tribunal had failed to consider all the contentions raised while passing the order : as the hearing was concluded on 13.07.2001 and the order was passed on 04.09.2001.

20. That takes us to the question as to whether what relief should be granted to the petitioner as the petitioner has already retired by now. The petitioner has claimed the following reliefs :

"16. In the above circumstances of the case, the petitioner prays that :

A. This Hon.Court be pleased to declare the impugned judgment of CAT Ahmedabad rejecting the OA/357/99 with MAs, as arbitrary, illegal, unjust and violative of Articles 14 & 16 of the Constitution of India and be pleased to quash and set aside the same and direct the respondents to treat the petitioner as senior to the respondent no.3 in the seniority of Matron and grant all consequential benefits of promotion as Chief Matron from retrospective date, with 18% interest.

B. Be pleased to declare that in light of the judgment of the Hon.Supreme Court in Ajit Singh-II case, the petitioner regained her seniority over the respondent no.3 and therefore, the petitioner is required to be promoted to the post of Chief Matron from retrospective date, and seniority was required to be maintained accordingly and petitioner be granted all consequential benefits with 18% interest."

21. However, even this aspect stands answered now by the Apex Court's decision in the case of M.G.Badappanavar And Another vs. State of Karnataka and others, (2001) 2 SCC 666. Wherein it is laid down thus :

"19. In fact, some general candidates who have since retired, were indeed entitled to higher promotions, while in service if Ajit Singh II is to apply they would, get substantial benefits which were unjustly denied to them. The decision in Ajit Singh II is binding on us. Following the same, we set aside the judgment of the Tribunal and direct that the seniority lists and promotions be reviewed as per the directions given above, subject of course to the restriction that those who were promoted before 1/3/1996 on principles contrary to Ajit Singh II need not be reverted and those who were promoted contrary to Sabharwal before 10/2/1995 need not be reverted. This limited protection against reversion was given to those reserved candidates who were promoted contrary to the law laid down in the above cases, to avoid hardship."

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"21.So far as the general candidates are concerned, their seniority will be restored in accordance with Ajit Singh II and Sabharwal (as explained in Ajit Singh II) and they will get their promotions accordingly from the effective dates. They will get notional promotions but will not be entitled to any arrears of salary on the promotional posts. However, for purposes of retiral benefits, their position in the promoted posts from the notional dates - as per this judgment - will be taken into account and retiral benefits will be computed as if they were promoted to the posts and drawn the salary and emoluments of those posts, from the notional dates".

22. Hence, applying the aforesaid ratio, we hold that the petitioner would be entitled to promotion with effect from 28/6/1999 when respondent No.3 was promoted to the post of Chief Matron. The respondent Nos. 1 and 2 are directed to immediately review the promotions granted overlooking the claim of the petitioner and consider the case of promotion of the petitioner to the post of Chief Matron if otherwise found suitable. This exercise should be undertaken and carried out within a period of four weeks from today. If the petitioner is granted promotion the same shall be made notionally effective from 28/6/1999 and all consequential benefits shall flow to her except that she will not be entitled to any arrears of salary on the promotional post for the interregnum.

23. The petition is allowed accordingly. Rule made absolute. There shall be no order as to costs.

Sd/-
(D.M.Dharmadhikari, C.J.)

Sd/-
(D.A.Mehta,J)

At this stage Mr.K.K.Shah for respondent No.3 made a request that respondent No.3 should not be reverted and direction to the said effect may be issued. It is not possible to accept such a request at this stage, in view of the fact that the petitioner is on the verge of retirement and the authorities have merely been directed to consider her case for promotion if found suitable. The request is rejected accordingly.

Sd/-
(D.M.Dharmadhikari,C.J)

Sd/-
(D.A.Mehta, J)

m.m.bhatt